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Phillip I. Blumberg

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# **Accountability of Multinational Corporations: The Barriers Presented by Concepts of the Corporate Juridical Entity**

*By* PHILLIP I. BLUMBERG\*

## **Introduction**

Large multinational corporations have come to dominate the national and global economic scene. The scale of their operations is enormous. The largest have grown into enterprises of astonishing magnitude that in their economic dimensions are fully comparable to nation states. Imposing adequate controls over multinational conduct and achieving accountability by multinationals for their conduct both at home and abroad should be a major objective of every industrialized power.

Such a process has been underway for almost three quarters of a century starting with the beginnings of the corporate responsibility movement of the 1920s.<sup>1</sup> It proceeds on many fronts in addition to law: the market, the climate of opinion, codes of conduct and other forms of self-regulation, and moral pressures. National law, international trade conventions, and international law itself also play a role, still minor, but of increasing significance. Of these efforts to regulate overseas activities of multinational corporations, the international progress in dealing with foreign corrupt practices, focusing on bribes and political contributions, is the outstanding

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\* Dean and Professor of Law and Business, Emeritus at University, Connecticut School of Law. A.B., Harvard; J.D., Harvard; LL.D. (hon.), Connecticut. Professor Blumberg has published ten books dealing with corporate groups and corporate accountability. Copyright, The Blumberg Trust, 2001. All rights reserved.

1. PHILLIP I. BLUMBERG, *CORPORATE RESPONSIBILITY IN A CHANGING SOCIETY* (1972).

success. It is a success in which the United States with its pathbreaking Foreign Corrupt Practices Act can take justifiable pride.<sup>2</sup>

While activism in these areas has had numerous other successes and gives promise of further success, my assigned role requires me to sidestep discussion of this area of growing importance. Instead, my presentation deals with the inherent limitations of the American legal system (and of other Western legal systems as well) in achieving corporate accountability on the international level and in effectively enforcing legal restraints on corporate behavior abroad. These fundamental structural problems largely arise from the widespread use by American and other multinational parent corporations of foreign-owned subsidiary corporations to conduct the overseas business of the enterprise.<sup>3</sup>

The focus of the conference is "Holding Multinational Corporations Responsible under International Law." The creation or recognition of legal obligations of multinational corporations, whether under national or international law, is only the first step. Where contested, such obligations must be enforced through the courts. Where the conduct under challenge has been committed overseas by foreign-owned subsidiaries of the American corporate group, it is distressing to discover that the American legal system presents inherent barriers that make achieving "the day of accountability in court" all too often illusory.

This, then, is my role: to explore in the limited time and space available the inadequacies of the American legal system in enforcing legal obligations of multinational corporations. The major source of the problem arises from the ancient concept of the corporate juridical entity that, particularly in the case of large public corporations, departs sharply from the economic reality of modern business enterprise. As I have explored at length elsewhere, the limitations inherent in traditional concepts of entity law present a major

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2. 15 U.S.C. §§ 78dd-1, dd-2, 78l, 78o (1994). See *infra* text accompanying notes 69 to 71.

3. The United Nations Transnational Corporations and Management Division once estimated that there were 35,000 multinational corporations with 170,000 foreign affiliates. They were highly concentrated with the largest 100 multinationals (excluding those in banking and finance) having assets of about \$3.1 trillion, of which \$1.2 trillion were outside their home countries. Of the largest fifty ranked by asset size, thirteen were American, seven were French, six were Japanese, five were German, and four were British or Anglo-Dutch. Bill Emmott, *Survey, Multinationals - Back in Fashion*, *ECONOMIST*, Mar. 27, 1993, at 5-6.

challenge to national corporation law and to international law.<sup>4</sup>

Achieving accountability over American multinational corporations for the overseas activities of their subsidiary corporations faces two other serious problems in addition to the barriers presented by traditional corporate jurisprudence. The first arises from the considerable barriers to achieving jurisdiction in American courts over foreign subsidiaries of American multinational groups. This pushes counsel to sue their American parent corporation instead. While this may solve the jurisdictional problem, it does so at the high cost of the difficulties of establishing either the vicarious liability of the parent corporation for the actions of the subsidiary or the direct participation of the parent in the activity complained of.

Secondly, even when jurisdiction may be achieved over the foreign parent or subsidiary corporation, courts have discretionary authority to decline to hear the case. This is the doctrine of *forum non conveniens*. It presents a further formidable obstacle to litigation seeking an American adjudication of allegedly wrongful conduct abroad injuring foreign plaintiffs, whether brought against the American multinational parent corporation, or one of its foreign subsidiaries.

Both of these procedural problems are major problems for international litigation and deserve careful examination. However, in view of the limited time and space available, this essay can deal only with the barriers of traditional corporation law to the imposition of substantive liability on multinational parents for the acts of their subsidiaries, particularly foreign subsidiaries.

## I. The Confines of Traditional Entity Law

The legal systems of the Western world as developed many centuries ago focus on individuals and their rights and liabilities. In

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4. See PHILLIP I. BLUMBERG, THE LAW OF CORPORATE GROUPS, including volumes reviewing problems of parent and subsidiary corporations in PROCEDURAL LAW (1983) [hereinafter LCG-I]; BANKRUPTCY LAW (1985) [hereinafter LCG-II]; SUBSTANTIVE LAW (1987) [hereinafter LCG-III]; STATUTORY LAW: GENERAL (1989) [hereinafter LCG-IV]; STATUTORY LAW: SPECIFIC (1992) (with Kurt A. Strasser) [hereinafter LCG-V]; STATUTORY LAW: STATE (1995) (with Kurt A. Strasser) [hereinafter LCG-VI]; and ENTERPRISE LAW IN COMMERCIAL RELATIONSHIPS (1998) (with Kurt A. Strasser) [hereinafter LCG-VII]; and PHILLIP I. BLUMBERG, THE MULTINATIONAL CHALLENGE TO CORPORATION LAW (1992) [hereinafter MULTINATIONAL CHALLENGE].

relatively recent times, they have been adapted imperfectly to deal with the legal problems of corporate organizations, particularly complex corporate organizations.

The crucial question faced by the law is the attribution of the conduct under examination to the particular actor responsible for it. With individuals, this presents no conceptual problems, only problems of fact. Under the traditional concept, each individual is a separate juridical entity with his own rights and duties. When the small corporation is similarly conceived as a separate juridical entity with its rights and duties separate from those of its shareholder or shareholders, this theoretical foundation is sorely strained; and when applied to the complex corporate structure of the large multinational enterprise, it breaks down. The legal system that could largely resolve the legal problems presented by the early period of the Industrial Revolution is incapable in its traditional form of dealing effectively with the problems of the multi-tiered multinational corporate group functioning with a parent corporation, sub-holding companies, and scores or hundreds of subsidiary corporations organized under the laws of countries around the globe.

To grasp fully the severe jurisprudential limitations of traditional corporation law, a brief historical review is desirable. The imposition of effective legal control on all elements of the large corporations dominant in the national and world economies of the modern world faces serious obstacles by reason of the anachronistic nature of traditional corporation law. This traditional law arose from the efforts of English judges to formulate a law of corporations based on medieval concepts of Roman law for municipal corporations and church institutions: areas without commercial significance and institutions very remote indeed from business corporations in general and modern large corporations in particular. When English business corporations arose, the early law developed for municipal corporations became the model for the fledgling business corporations.<sup>5</sup> Thus, Coke's famous definition of the nature of the corporation in 1612 was written at a time when there were virtually no business corporations in England.<sup>6</sup> However, almost two centuries later, it served as the foundation of Blackstone's description of the

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5. BLUMBERG, *MULTINATIONAL CHALLENGE*, *supra* note 4, at 379; BLUMBERG, *LCG-III*, *supra* note 4, §1.03.

6. 2 EDWARD COKE, *THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND; OR A COMMENTARY UPON LITTLETON* 250a (London, W. Clarke, 1st ed. 1628); *Case of Sutton's Hospital*, 77 Eng. Rep. 960, 970-71, 973 (1612).

corporation<sup>7</sup> and was subsequently adopted by Chief Justice Marshall in his celebrated opinions in *Bank of the United States v. Deveaux* and the *Dartmouth College* case.<sup>8</sup>

The traditional corporation law rests on the concept of the separate corporate juridical personality. It is the doctrine that a corporation and its shareholders are separate juridical entities and that the corporation's rights and liabilities are separate and distinct from the rights and liabilities of its shareholders. This is entity law.

This jurisprudential doctrine of the separate corporate personality with such unlikely roots provides the foundation for American corporation law governing multinational corporations today. It has been strongly buttressed by an entirely different concept, a political concept. This is the concept of limited liability. Limited liability, not the jurisprudential concept of separate juridical personality, dominates the discussion today.

At the outset, it is important to understand that limited liability is an entirely different doctrine<sup>9</sup> arising as a result of the pressures on the growing corporations of the first half of the nineteenth century to raise the capital required to take advantage of the emerging technology of the times. It was a matter of protracted political struggle before limited liability was accepted by Northeastern legislatures, climaxing in its adoption by Massachusetts in 1830, but with isolated pockets of unlimited liability continuing until the mid-1850s, except for in California which retained unlimited liability in its

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7. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 467-68, 470, 472, 478 (Oxford, Clarendon Press, 1st ed. 1765).

8. *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 86-91 (1809); *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819).

9. Although shareholders were not directly liable to corporate creditors for the debts of the corporation, they were subject to indirect liability in the form of levations or assessments by corporations to raise the funds to satisfy debts. Further, the House of Lords in 1671, followed a century and one half later by American courts, upheld the right of corporate creditors to obtain equitable relief to compel a corporation to levy assessments on shareholders necessary to pay the corporate debts. *Salmon v. Hamborough Co.*, 22 Eng. Rep. 763 (H.L. 1671); *Hume v. Winyaw & Wando Canal Co.*, 1 Carolina L.J. 217 (1830). See *Briggs v. Penniman*, 8 Cow. 387, 395-96 (N.Y. 1826); *Slee v. Bloom*, 19 Johns. 456, 493, 499 (N.Y. 1822); cf. *Commonwealth v. Blue-Hill Tpk. Corp.*, 5 Mass. 420, 426 (1809).

Thus, separate personality did not mean limited liability so long as the customary form of stock subscription contract between the corporation and stockholders was subject to stockholder assessments. After the customary form provided that shares were being issued as fully paid and non-assessable, shareholder liability (in the absence of statutory assessment provisions) ceased with the payment of the original subscription price.

constitution until 1930.<sup>10</sup>

Limited liability was seen as advantageous because it separated the investor from exposure to responsibility for corporate debts beyond the amount of his or her investment.<sup>11</sup> It arose at a time when except by special act of the legislature never given in the case of manufacturing corporations, a corporation could not own the stock of another corporation. Corporate groups and holding companies were impossible, and remained impossible for half a century.<sup>12</sup> Only when New Jersey amended its corporation laws around 1890 to authorize intercompany stock ownership for all corporations and other states promptly followed suit, did corporate groups become possible.<sup>13</sup> Giant American corporations such as United States Steel, Standard Oil of New Jersey, and American Sugar Company speedily emerged, and an increasing concentration of American industry began. The trust device had been struck down earlier by the courts as against public policy,<sup>14</sup> but corporate groups provided a lawful alternative route.

The crucial significance of this development for our purposes is that no court, then or since, in a case involving the legal responsibility of a parent corporation for the acts of its subsidiary has examined as a matter of first consideration whether the doctrine of limited

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10. New York (1811), New Hampshire (1816), New Jersey (1816), and Maine (1823) led the way. After Massachusetts, the leading industrialized state, adopted general limited liability in 1830, limited liability became generally accepted in the United States. However, unlimited liability continued in a handful of states until the 1850s, and remarkably, unlimited liability in California survived until the 1930s. CAL. CONST. of 1879, art. XII, § 3 (repealed 1930); CAL. CIV. CODE § 322 (repealed 1932). See BLUMBERG, LCG-III, *supra* note 4, §1.05.

The English experience was somewhat different. Liability limitation precipitated an extended political struggle, before limited liability prevailed in 1859. H.A. Shannon, *The Coming of General Limited Liability*, 6 ECON. HIST. 267 (1931). See generally BLUMBERG, LCG-III, *supra* note 4, § 1.03.

11. During the nineteenth century, general limited liability was not complete. In most states either by statute or constitution, shareholders continued to be liable for double or even triple assessments on their shares to pay corporate debts. See 1 C. BEACH, COMMENTARIES ON THE LAW OF PRIVATE CORPORATIONS 675 n.1 (8th ed. 1926). In the case of banks, double liability continued until the 1930s and the advent of federal deposit insurance. Act of Dec. 23, 1913, ch. 6, § 23, 38 Stat. 251, 373 (1913) (amended 1933 and 1935) (repealed 1959).

12. See *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 566, 589 (1933).

13. Act of Apr. 4, 1888, ch. 269, § 1, 1888 N.J. Laws 385-86; Act of Apr. 17, 1888, ch. 295, § 1, 1888 N.J. Laws 445-46; Act of May 9, 1889, ch. 265, §4, 1889 N.J. Laws 412, 414; Act of Mar. 14, 1893, ch. 171, § 2, 1893 N.J. Laws 301.

14. *People v. N. River Sugar Refining Co.*, 121 N.Y. 582 (1890); *State ex rel. v. Standard Oil Co.*, 49 Ohio St. 137 (1892).

liability—developed to protect investors from the debts of the enterprise—also shielded the parent from liability for the debts of a subsidiary. Unlike the investors in the parent corporation itself who were solely investors, the parent corporation was instead part of the business enterprise engaged along with its subsidiary in the collective conduct of the business under the parent's control. Further, it provided a second layer of limited liability with the parent insulated from the debts of the subsidiaries as well as the ultimate investors in the enterprise insulated from the debts of the parent corporation and the enterprise. In the typical multi-tiered multinational group in the modern economy, this has resulted in three, four, or even five or more separate layers of limited liability.

Instead of inquiring whether this dramatic change required a fresh consideration and possible limitation of the doctrine, the courts, then and since, have automatically applied concepts and policies designed to separate investors from liability for the risks of the business to protect as well each of the upper-tier companies of the enterprise from liability for the debts incurred by their lower-tier subsidiaries in conducting the common business of the group.

In the modern world, parent corporations operate multinational groups of enormous dimensions through multi-tiered corporate structures of "incredible complexity"<sup>15</sup> composed of dozens or hundreds of subsidiaries organized under the laws of scores of countries collectively conducting assigned segments of a single business under the "control" of the parent corporation. To the public and to economists, the multinational corporation is a single enterprise, "the firm." However, the law sees the multinational, such as British Petroleum with its tiers of sub-holding companies and more than 1,200 subsidiaries,<sup>16</sup> as 1,200-odd separate independent entities. Under the traditional legal view, each of these intertwined segments of the British Petroleum enterprise is a separate juridical entity, with its own legal duties and liabilities separate and distinct from its parent corporation and affiliates under whose direction it is conducting its fragment of the common business being collectively conducted with the other members of the group. This is entity law. It is a legal conception that is manifestly anachronistic and bears no resemblance to the economic reality.

Traditional entity law treating each subsidiary in this manner as a

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15. Hadden, *Inside Corporate Groups*, 12 INT'L J. SOC. L. 271, 274 (1984).

16. *Id.* at 271.



separate legal actor, distinct from its parent corporation and affiliates, creates a fundamental barrier to the imposition of liability, both under common law and under statutory law, upon parent and affiliates for the activities of a subsidiary of the group. It lends itself to widespread strategic use to evade common law and statutory policies.

Direct liability on the part of the dominant parent corporation for the actions of its subservient subsidiary companies can arise, of course, if it directly participates in the acts complained of. However, as a result of the limitations of entity law, vicarious liability may arise only through one or the other of two rigorously restricted doctrines. One is the equitable doctrine of "piercing the corporate veil," the other is the common-law concept of agency law. Unfortunately, neither provides an adequate solution in the overwhelming number of cases.

### A. *Piercing the Veil*

Under the traditional formulations,<sup>17</sup> "piercing" has rigorous

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17. Virtually all state jurisdictions in the United States subscribe to one of the two traditional formulations of "piercing the veil jurisprudence": the three factor "instrumentality doctrine" and the "alter ego" doctrine. Despite the literal differences, the two doctrines are widely regarded as essentially interchangeable. *Wm. Passalacqua Builders, Inc. v. Resnick Developers S., Inc.*, 933 F.2d 131, 138 (2d Cir. 1991) (quoting the author); *Baker v. Raymond Int'l, Inc.*, 656 F.2d 173 (5th Cir. 1981), *cert. denied*, 456 U.S. 983 (1982).

The "instrumentality doctrine" requires "excessive control," wrongful or inequitable conduct, and causal relationship to the plaintiff's loss. A common formulation is:

(1) Control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and

(2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest or unjust act in contravention of the plaintiff's legal rights; and

(3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.

*Lowendahl v. Baltimore & Ohio R.R. Co.*, 287 N.Y.S. 62, 76 (N.Y. App. Div.), *aff'd*, 6 N.E.2d 56 (1936) (emphasis omitted).

The common formulation of the "alter ego" doctrine provides that it is applicable (1) when such "unity of ownership and interest" exists that the two affiliated corporations have ceased to be separate and the subsidiary has been relegated to the status of the "alter ego" of the parent; and (2) where recognition of

prerequisites that present formidable hurdles. It is an equitable remedy that is available only in "rare" or "exceptional" circumstances.

Its first requirement is a demonstration that the subsidiary lacks separate independent identity of its own. Such lack of separate identity may arise in two ways: excessive "control" by the parent and lack of the forms of separate existence.<sup>18</sup>

First, it may arise from an excessive exercise by the parent of its control over the management, operation, and decision-making of the subsidiary eliminating any independent role for the officers and directors of the subsidiary. All courts agree that "control" arising from 100 percent stock ownership and common identity of the parent's and the subsidiary's officers and directors is insufficient.<sup>19</sup> In addition, led by the Supreme Court, the courts have generally accepted a concept of parent/subsidiary relationships that are "perfectly consistent with the norms of corporate behavior," which are similarly deemed insufficient to satisfy the "control" requirement for "piercing." These include broad areas of subsidiary decision-making, including oversight and monitoring of subsidiary performance; determination of the subsidiary's general policies, practices, and procedures; capital budgets; executive salaries; and financing.<sup>20</sup> Although disputed, many courts applying "piercing" jurisprudence insist that the parent's participation in the management

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them as separate entities would sanction fraud or lead to an inequitable result. *E.g.*, *RRX Indus., Inc. v. Lab-Con, Inc.*, 772 F.2d 543, 545 (9th Cir. 1985) (California law); *Pan Pacific Sash & Door Co. v. Greendale Park, Inc.*, 333 P.2d 802 (Cal. Ct. App. 1958).

Federal law generally follows the state model. However, the Second Circuit is an exception. In federal matters, the Court of Appeals for the Second Circuit has significantly relaxed the traditional doctrine to "pierce" whenever *either* lack of separate identity *or* wrongful or inequitable abuse can be established. *E.g.*, *Carte Blanche (Sing.) Pte., Ltd. v. Diners Club Int'l, Inc.*, 2 F.3d 24 (2d Cir. 1993); *Wm. Passalacqua Builders, Inc.*, 933 F.2d 131. Until corrected by the New York Court of Appeals, it even applied this significant departure from the three factor "instrumentality" doctrine to diversity matters controlled by New York law. *Morris v. N.Y. State Dep't of Taxation & Fin.*, 623 N.E.2d 1157, 1160-61 (N.Y. 1993).

18. Although it is clear that either of these two alternative routes will satisfy the lack of separate identity prerequisite for "piercing," the traditional formulations overlook this complexity.

19. *See United States v. Jon-T Chems, Inc.*, 768 F.2d 686, 691 (5th Cir. 1985) (stating "we maintain the [hats] fiction"), *cert. denied*, 475 U.S. 1014 (1986); *Steven v. Roscoe Turner Aeronautical Corp.*, 324 F.2d 157 (7th Cir. 1963); *Kingston Dry Dock Co. v. Lake Champlain Transp. Co.*, 31 F.2d 265 (2d Cir. 1929).

20. *See United States v. Bestfoods*, 524 U.S. 51 (1998).

of the subsidiary must extend to day-to-day decisions before "piercing" is appropriate.<sup>21</sup> In the classic doctrinal formulation, "control" must extend to the extreme where "the subsidiary has no mind, will, or existence of its own."<sup>22</sup>

The prerequisite of demonstration of the lack of separate identity may also be demonstrated by the extent of the reality of its business operations and even by matters of form. Does the subsidiary have separate books and records? Has it complied with corporate formalities with respect to meetings of its shareholders and boards of directors and filing reports? Does it have its own office, telephone number, stationery, assets, employees, business with others than the parent?<sup>23</sup> Was it organized with adequate capitalization?<sup>24</sup>

Reflecting the equitable origins of the doctrine, a second traditional prerequisite for "piercing" is a showing that the subsidiary has been used as a shield to accomplish some fraudulent or unjust or inequitable conduct for the benefit of the parent or controlling shareholder. The conduct must be "morally culpable" or "fundamentally unfair."<sup>25</sup> Commission of a tort, for example, does not satisfy the standard.<sup>26</sup>

A final requisite, one frequently ignored in practice by the courts, is that the defendant's conduct has to have caused an injury to the plaintiff.<sup>27</sup> Thus, some courts require a showing that the subsidiary is insolvent or otherwise unable to satisfy a judgment.<sup>28</sup>

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21. See, e.g., *Quarles v. Fuqua Indus., Inc.*, 504 F.2d 1358, 1364 (10th Cir. 1974). See generally BLUMBERG, LCG-I, *supra* note 4, § 3.05.2.

22. *Supra* note 17.

23. See BLUMBERG, LCG-III, *supra* note 4, § 20.12.

24. There is some ambivalence about the role of inadequate capitalization. While all courts recognize that this is a factor of significance, some courts consider it as a factor demonstrating lack of separate identity while others look upon it as a form of wrongful or unjust conduct, particularly in tort matters.

25. E.g., *Dania Jai-Alai Palace, Inc. v. Sykes*, 450 So. 2d 1114 (Fla. 1984); *Morris v. N.Y. State Dep't of Taxation & Fin.*, 623 N.E.2d 1157, 1160-61 (N.Y. 1993); *DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co.*, 540 F.2d 681 (4th Cir. 1976).

26. Isolated courts have identified torts as a wrong included in "wrongful conduct" or "injustice." However, this view has been overwhelmingly rejected by a majority of the courts. Otherwise, vicarious group liability for torts would always arise on a showing of lack of separate identity and causation.

27. *Supra* note 17; *infra* note 28; see also *Whitfield v. Bic Corp.*, 1994 U.S. App. LEXIS 26996 (6th Cir. Sept. 24, 1994); *Eckhaus v. Blauner*, 1997 U.S. Dist. LEXIS 9043 (S.D.N.Y. June 26, 1997); *Carte Blanche (Sing.) Pte., Ltd. v. Diners Club Int'l, Inc.*, 802 F. Supp. 1006 (S.D.N.Y. 1992), *rev'd on other grounds*, 2 F.3d 24 (2d Cir. 1993).

28. E.g., *Ranger Enters., Inc. v. Leen & Assocs., Inc.*, 1998 U.S. App. LEXIS

These standards most readily apply, where they apply at all, to closely held small corporations functioning without adequate legal counsel. In the large public corporation, routinely operating under the watchful eyes of "house counsel" reinforced by outside counsel, violations of matters of form and lack of separate facilities, equipment, operational and managerial staff are unlikely. With counsel available, the traditional justifications for "piercing" are not likely to occur. Furthermore, the standards are best suited for dealing with private controversies. Their application to issues in which public concerns play a major role becomes profoundly unsatisfying.

This is one of the most unsatisfactory areas of the law. With hundreds of irreconcilable decisions and shifting rationales, it functions in an almost inscrutable manner behind conclusory metaphors such as "mere instrumentality," "sham," "adjunct," "agent," "alter ego," "puppet," or dozens of similarly murky terms.<sup>29</sup>

### ***B. Common-Law Agency***

This is the alternative route to the imposition of liability on a parent corporation for acts of a subsidiary. In the parent-subsidiary relationship, however, an agency relationship satisfying the common-law requirements rarely arises. For an agency relationship, the common law requires not merely "control" but also a consensual transaction. The parties must agree that the subsidiary (if it is to be an agent) is acting for the parent (the principal).<sup>30</sup> The acts of a subsidiary acting as an agent are, from the legal point of view, the acts of its parent corporation, and it is the parent that is liable. With subsidiaries typically utilized to shield the parent corporation from liability, it should be no surprise that very few parent/subsidiary relationships satisfy the common law requirements for an "agency" relationship. The other element, the dominant parent's "control" over its subsidiary is, of course, readily satisfied, but proof of this element in and of itself is insufficient. Indeed, as Learned Hand

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23774 (9th Cir. Sept. 21, 1998); *HealthOne, Inc. v. Columbia Wesley Med. Ctr.*, 2000 U.S. Dist. LEXIS 14857 (D. Kan. Aug. 22, 2000); *Noto v. Cia Secula di Armanento*, 310 F. Supp. 639 (S.D.N.Y. 1970) (alternative holding). See 13A WILLIAM MEADE FLETCHER ET AL., *FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* § 6318 (rev. perm. ed. 1984).

29. See HARRY G. HENN & JOHN R. ALEXANDER, *LAWS OF CORPORATIONS* §146 n.2 (3d ed. 1983); ELVIN R. LATTY, *SUBSIDIARIES AND AFFILIATED CORPORATIONS* 157 (1936).

30. RESTATEMENT OF AGENCY (THIRD) § 1.01 (Tentative Draft No. 2, Mar. 14, 2001).

observed, if it were, every parent/subsidiary relationship would be an agency relationship.<sup>31</sup> In consequence, multinational liability under the "agency" concept is most often an entirely unpromising remedy. In most cases, "piercing the veil" with all its limitations remains the sole conceptual basis for imposition of vicarious liability on multinationals for the acts of the group.

Although "piercing" is an ineffective basis for the imposition of responsibility on multinational parents for the activities of their subsidiaries, it cannot be entirely dismissed. Notwithstanding the inherent conceptual difficulties, the courts in hundreds of cases, perhaps motivated by the serious consequences of a ritualistic application of the doctrine, have, nevertheless, imposed "piercing" liability on corporate parent corporations. While most of these decisions involved smaller corporations, the body of jurisprudence has useful value, not only in providing some deterrence of corporate conduct, but for litigation itself in appropriate cases. However, it usually proves to be a less than useful remedy.

### C. "Piercing" Jurisprudence in Statutory Matters

When one moves from private controversies at common law to matters in which public concerns play a major role, as in the application of statutory regulatory law, the prospects of "piercing" may be brighter. In the past, the federal courts had made considerable progress in fashioning a newer jurisprudence better adapted to the implementation of the underlying objectives of federal regulatory and remedial legislation.

In numerous decisions, the courts had refashioned the "piercing" doctrines developed in cases involving common law controversies involving private parties for use in cases in the statutory area where questions of important public policy were at stake. Thus, a series of Supreme Court decisions have brushed aside the traditional doctrine to achieve implementation of statutory programs in the face of complex corporate structures.<sup>32</sup> Other decisions substantially watered down the rigorous traditional requirements for "piercing" in matters of statutory application. They developed a form of "modified

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31. *Kingston Dry Dock Co. v. Lake Champlain Transp. Co.*, 31 F.2d 265, 267 (2d Cir. 1929); *Bendix Corp. v. Adams*, 610 P.2d 24, 32-33 (Ala. 1980).

32. *See, e.g., Anderson v. Abbott*, 321 U.S. 349, 361-66, *reh'g denied*, 321 U.S. 804 (1944); *Schenley Distillers Corp. v. United States*, 326 U.S. 432, 436-37 (1946) (*per curiam*); *cf. First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 622, 633-34 (1983).

piercing" under which matters of corporate form became less important, and the search for a fraudulent or wrongful or unjust or inequitable outcome generally was ignored.<sup>33</sup> They imposed statutory liability on parent corporations for violations of their subsidiaries in order to implement the underlying objectives and policies of the regulatory and remedial program; to prevent evasion by manipulation of the corporate structure, as by organization of subsidiaries to conduct the activity proscribed for the parent; and to prevent frustration of the legislative purpose. In the end, the courts that broadened the scope of the statutory regulatory programs to embrace the entire enterprise, of which the violating company was only a part, were proceeding out of a sense of judicial responsibility to go beyond the text (or lack of text) of a statute to fill in gaps and lacunae and otherwise make statutory systems work.<sup>34</sup> These developments gave strong hopes that with the passage of time, enterprise concepts would become more widely accepted where necessary to implement statutory programs.

Whether this process will continue is far from clear. First, in the area of statutory construction generally, recent decisions of the Supreme Court have emphasized strict construction and the governing role of the text. In the employment statutory area, in particular, they have been insistent on confirming the common law definition of "employee," rejecting earlier decisions extending statutory remedial provisions to protect other workers not meeting the common law definition test.<sup>35</sup> Recent decisions, including the

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33. See, e.g., *Town of Brookline v. Gorsuch*, 667 F.2d 215 (1st Cir. 1982) (applying modified "piercing" doctrine) (as amended); *Capital Tel. Co. v. FCC*, 498 F.2d 734, 738-39 (D.C. Cir. 1974) (same); *SEC v. Elmas Trading Corp.*, 620 F. Supp. 231, 234 (D. Nev. 1985) (same); *United States v. Firestone Tire & Rubber Co.*, 518 F. Supp. 1021, 1039 (N.D. Ohio 1981) ("Thus corporate formalities cannot be used to circumvent a statutory policy.").

34. See BLUMBERG, LCG-IV, *supra* note 4, §§ 1.02.3-6.

35. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992); *Patterson v. Shumate*, 505 U.S. 1239 (1992); *cf.* *Central Bank v. First Interstate Bank*, 511 U.S. 164 (1994). *But cf.* *United States v. Silk*, 331 U.S. 704, 713 (1947) (noting the content of a statutory term in the context of a particular federal statute was a federal problem "to be construed in the light of the mischief to be corrected and the end to be attained").

The movement towards strict construction has been strongly criticized. See Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749 (1995); Melvin Eisenberg, *Strict Textualism*, 29 LOY. L.A. L. REV. 13 (1995); William N. Eskridge, Jr., *The New Textualism*, 37 U.C.L.A. L. REV. 621 (1990).

Supreme Court decision in *United States v. Bestfoods*<sup>36</sup> and a series of decisions in the Court of Appeals for the Seventh Circuit<sup>37</sup> emphasizing the controlling role of traditional corporation law and "piercing the veil jurisprudence" raise further doubts as to the role of enterprise concepts in this area.

In *United States v. Bestfoods*, the Supreme Court held that the imposition of vicarious liability on a parent corporation for its subsidiary's treatment of hazardous wastes in violation of the Superfund provision of the Comprehensive Environmental Responsibility and Compensation Act<sup>38</sup> was possible only in the event of compliance with the traditional veil-piercing requirements. Numerous Courts of Appeals had reached a contrary construction of the statute. They had relied on the fundamental policy of the Superfund provisions that broad liability for cleaning of contaminated property was critical to implementation of the statutory public policy.<sup>39</sup> In its decision in *Bestfoods*, the Court ignored this statutory policy. At the same time, it also ignored the line of decisions discussed above that had rejected "piercing" as the appropriate standard or applied a modified "piercing" jurisprudence based on implementation of statutory policies and prevention of evasion through the use of complex corporate structures.<sup>40</sup>

While the Court recognized in *Bestfoods* that the parent corporation would be directly liable for its own participation in the proscribed activity, it held irrelevant that the executives responsible were the very persons who were its own officers and directors. These

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36. *United States v. Bestfoods*, 524 U.S. 51 (1998).

37. *E.g.*, *Papa v. Katy Indus., Inc.*, 166 F.3d 937 (7th Cir. 1999); *Browning-Ferris Indus., Inc. v. Ter Maat*, 195 F.3d 953 (7th Cir. 1999).

38. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1625 (1986).

39. They included the Courts of Appeals for the First, Second, Third, Fourth, Eighth, and Eleventh Circuits and a number of district courts. *See United States v. Kayser-Roth Corp.*, 910 F.2d 24 (1st Cir. 1990), *cert. denied*, 498 U.S. 1084 (1991); *Schiavone v. Pearce*, 79 F.3d 248 (2d Cir. 1996); *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209 (3d Cir. 1993); *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 842 (4th Cir.), *cert. denied*, 506 U.S. 940 (1992); *United States v. TIC Inv. Corp.*, 68 F.3d 1082, 1091-92 (8th Cir. 1995) ("arranger" liability); *Jacksonville Elec. Auth. v. Bernuth Corp.*, 996 F.2d 1107 (11th Cir. 1993).

The Fifth and Sixth Circuits disagreed. *See Joslyn Mfg. Co. v. T.L. James & Co.*, 893 F.2d 80 (5th Cir. 1990); *United States v. Cordova Chem. Co.*, 113 F.3d 572 (6th Cir. 1997), *vacated and remanded sub nom. United States v. Bestfoods*, 524 U.S. 51 (1998).

40. *See supra* notes 32, 33.

individuals were, in addition, the officers and directors of the subsidiary. The Court accepted the reasoning of some of the courts wedded to traditional entity law that such an overlap was entirely irrelevant so long as the individuals were acting in their capacity as officers of the subsidiary at the time;<sup>41</sup> in the unhappy imagery employed in this area, the issue was which official "hat" they were wearing at the time.<sup>42</sup>

In view of these barriers to imposition of vicarious liability on corporate groups, it is not without significance that in some of the major recent litigations both in the United Kingdom and in the United States against multinational corporations, counsel has avoided the inherent difficulties of satisfying "piercing" standards. Instead, they have proceeded on the theory of the parent corporation's direct role in causing the injury complained of.<sup>43</sup> Where this can be shown, "piercing" and the role of the subsidiary, of course, become irrelevant.

#### ***D. Legislative Efforts for Group Accountability***

Traditional entity law created serious barriers not only to suits in the courts seeking to achieve corporate accountability through imposition of liability on parent corporations for acts of their subsidiaries in carrying on the work of the enterprise. For decades, traditional concepts of the corporation presented substantial obstacles to statutory regulatory efforts as well. Thus, until new legislative techniques successfully sidestepping these limitations were at last developed in 1933, prior legislative efforts to impose national policy on areas of the economy had proved almost completely ineffective. These statutes proved ineffective because their scope was defined in narrow entity terms. For example, statutes regulating the railroads applied only to corporations meeting the definition of

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41. 524 U.S. at 68-70.

42. *But see* United States v. Sealey, Inc., 388 U.S. 350, 353 (1967) ("[W]e are moved by the identity of the persons who act, rather than the label of their hats.").

For discussion of the "hats" theory, see BLUMBERG, LCG-I, *supra* note 4, §1.02.1 (cited by the Court) and BLUMBERG, LCG-III, *supra* note 4, § 29.02 (criticizing the "hats" theory) (not cited by the Court).

43. *E.g.*, Torres v. S. Peru Copper Corp., 113 F.3d 540 (5th Cir. 1997); Jota v. Texaco Inc., 157 F.3d 153 (2d Cir. 1998); Doe I v. Unocal Corp., 110 F. Supp. 2d 1294 (C.D. Cal. 2000).

Comparable developments in England include *Connolly v. RTZ Corp.*, 3 W.L.R. 373 (H.L. 1997) and *Sihole v. Thor Chems. Holdings Ltd.*, No. JC 98 647, 779, 798 (Q.B.D. July 31, 1998).



"carriers."<sup>44</sup> The World War I Trading with the Enemy Act applied only to "corporations incorporated" or "doing business" in the territory of the enemy.<sup>45</sup>

These statutes were readily evaded by organizing and operating a subsidiary not meeting the statutory definition to conduct the activity prohibited by the statute for the parent corporation. Thus, the railroads evaded the so-called "commodity" clause prohibiting transportation of products of their own manufacture or mining, such as steel or coal, through subsidiaries that operated the steel or coal concessions in question.<sup>46</sup> Similarly, the Supreme Court held that the World War I Trading with the Enemy Act applied only to corporations organized under American law and had no application to corporations organized under the laws of other countries even though wholly owned by enemy nationals.<sup>47</sup>

This unhappy period of statutory impotence came to an end with the first Franklin D. Roosevelt administration. Recognizing the conceptual barrier erected by the courts, the draftsmen of the early New Deal reform statutes, such as the Securities Act of 1933,<sup>48</sup> the Securities & Exchange Act of 1934,<sup>49</sup> the Emergency Railroad Act of 1933,<sup>50</sup> and the Public Utility Holding Company of 1935,<sup>51</sup> resourcefully solved the conceptual difficulty. The scope of the statutes and administrative regulations were defined in functional, not conceptual terms. They did so through the introduction of the concept of "control" and the imposition of liability on "controlling" persons for statutory violations of members of the group.<sup>52</sup> Concepts

44. 34 Stat. 584 (1906), 49 U.S.C. § 1(8) (superseded).

45. 40 Stat. 41 (1917), 50 U.S.C. app. § 1 *et seq.* (1994).

46. *United States v. Lehigh Valley R.R. Co.*, 220 U.S. 257, 272-73 (1911); *United States v. Del., Lackawanna & W. R.R. Co.*, 238 U.S. 516, 526, 528-30 (1915); *United States v. Reading Co.*, 253 U.S. 26, 60-63 (1920); *United States v. Elgin, Joliet & E. Ry.*, 298 U.S. 492, 506, 512 (1936); *United States v. S. Buffalo Ry. Co.*, 333 U.S. 771 (1948).

47. *Hamburg-Am. Line Terminal & Navigation Co. v. United States*, 277 U.S. 138 (1928); *Behn, Meyer & Co. v. Miller*, 266 U.S. 457 (1925). *But cf.* *Daimler Co. v. Cont'l Tyre & Rubber Co.*, [1916] 2 App. Cas. 307, 336-48 (upholding application of comparable British statute to British company owned by Germans).

48. Securities Act of 1933 § 15, 15 U.S.C. § 77o (1994).

49. Securities & Exchange Act of 1934 § 20, 15 U.S.C. § 78t (1994).

50. Emergency Railroad Act of 1933 § 5(2), (4), 48 Stat. 217 (1933); 54 Stat. 905, 907-08 (1940).

51. Public Utility Holding Company Act (PUHCA) of 1935 § 2(7), (8), (11), 15 U.S.C. § 79b(a)(7), (8), (11) (1994).

52. *E.g.*, Securities & Exchange Act of 1934, 15 U.S.C. §§ 78c(a)(8), 78l, 78m

of the corporate juridical personality and "piercing" standards which had previously frustrated effective statutory implementation became irrelevant.

The standard for "control" was functional and concerned with the realities. Even less-than-majority stock ownership, while relevant, was not decisive. Statutes could no longer be evaded by corporate manipulation. Thus, some statutes and implementing regulations using the "control" standard even fastened on stock ownership as low as five percent<sup>53</sup> or ten percent (in the absence of larger bloc in other hands)<sup>54</sup> to give rise to a rebuttable presumption of "control" and upon stock ownership of twenty-five percent<sup>55</sup> of the outstanding shares to give rise to a conclusive presumption.

As the doctrine of "control" matured, it was further strengthened by expansion of the sweep of liability so that it included not only the corporation "controlling" the corporation violating the statute (the parent corporation) but also the corporations that were "controlled by" the violator (subsidiaries), as well as corporations that were "under common control" with the violator (sister subsidiaries and affiliates).<sup>56</sup> Congress has since repeatedly used the functional definition of "control" to expand the scope of regulatory programs in numerous far reaching programs, including the Bank Holding Company Act,<sup>57</sup> the Savings and Loan Holding Company Act,<sup>58</sup> and the recent Gramm-Leach-Bliley Act authoring financial holding companies.<sup>59</sup> The states have done the same with numerous insurance regulatory statutes based on the Model Insurance Holding Company System Regulatory Act<sup>60</sup> and other statutes, particularly those

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(1994); Federal Communications Act of 1934, 47 U.S.C. § 219(a) (1994); Bank Holding Company Act (BHCA) of 1956, 12 U.S.C. § 1841(a)(1), (5) (1994); Savings & Loan Holding Company Act (SLHCA), 12 U.S.C. § 1462(4) (1994).

53. PUHCA, 15 U.S.C. § 79b(a)(11) (1994) ("affiliate"); BHCA, 12 U.S.C. § 1841(a)(3), (4) (1994); 12 C.F.R. § 225.31(d)(2)(i) (2000).

54. PUHCA, 15 U.S.C. § 79b(a)(7), (8) (1994) ("holding company" and "subsidiary company").

55. BHCA, 12 U.S.C. § 1841(a) (1994); 12 C.F.R. § 225.31(d)(2)(ii) (1994).

56. *E.g.*, 12 U.S.C. § 1841(a); SLHCA, 12 U.S.C. § 1462(9) (1994); Investment Company Act §§ 2(a)(40), 56(e), 15 U.S.C. §§ 80a-2(a)(40), 80a-56(e) (1994); General Rules and Regulations, Securities Act of 1933, 17 C.F.R. 230.144(a)(1) (2000).

57. 70 Stat. 133 (1956); 12 U.S.C. § 1841 *et seq.* (1994).

58. 12 U.S.C. § 1467(a) (1994).

59. Pub. L. No. 106-102, 113 Stat. 1388 (1999) (codified in various sections of titles 12, 15, 16, and 18 of the United States Code).

60. 3 NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS, MODEL

regulating the sale and distribution of alcoholic beverages<sup>61</sup> and the conduct of gambling enterprises.<sup>62</sup>

Still another notable jurisprudential development has occurred in the American statutory area. After the National Labor Relations Board fashioned a revolutionary "integrated enterprise" doctrine to determine the scope of statutory regulation under the National Labor Relations Act (NLRA) dealing with collective bargaining,<sup>63</sup> the courts did not stop at upholding the validity of the standard.<sup>64</sup> They went further and applied the doctrine, not only for the purposes of the NLRA, but for numerous other federal statutes in the areas of employment and anti-discrimination.<sup>65</sup>

Congress itself has made repeated use of the "integrated enterprise" standard in a series of amendments to Title VII of the Civil Rights Act of 1964,<sup>66</sup> the Age Discrimination in Employment Act<sup>67</sup> and the Americans with Disabilities Act.<sup>68</sup> Enacting the very formulation used by the courts and agencies in the labor and employment fields, Congress relied on "integrated enterprise" to extend overseas the protection for Americans against discrimination provided by the three statutes. Where an "integrated enterprise" could be shown, the statutes applied to Americans employed overseas, either by American parent corporations or their foreign subsidiaries as well.

One further example of the use of the concept of "control" to impose group liability on American parent corporations for the acts

INSURANCE HOLDING COMPANY SYSTEM REGULATORY ACT, MODEL LAWS, REGULATIONS AND GUIDELINES 440-41 (1996). This has been substantially enacted in many states. *Id.* at 440-43. See BLUMBERG, LCG-VI, *supra* note 4, at ch. 7.

61. *E.g.*, MASS. GEN. LAWS ANN. ch. 138, § 15 (West 1991); MO. ANN. STAT. § 311.260 (West Supp. 1993). See BLUMBERG, LCG-VI, *supra* note 4, at ch. 12.

62. *E.g.*, MISS. CODE ANN. § 75-76-1 *et seq.* (1991); NEV. REV. STAT. ANN. § 463.010 *et seq.* (Michie 1990); N.J. STAT. ANN. § 5:12-1 *et seq.* (West 1988 & Supp. 1993). See BLUMBERG, LCG-VI, *supra* note 4, at ch. 13.

63. 21 NLRB ANNUAL REPORT 14 (1956).

64. Radio & Television Broad. Technicians Local Union 1264 v. Broad. Serv. of Mobile, Inc., 380 U.S. 255 (1965) (per curiam).

65. These have included Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act (ADEA). See, *e.g.*, Chaiffetz v. Robertson Research Holding, Ltd., 798 F.2d 731, 735 (5th Cir. 1986); Armbruster v. Quinn, 711 F.2d 1332, 1337 (6th Cir. 1983). *Contra* Papa v. Katy Indus., 166 F.3d 937 (7th Cir. 1999).

66. Pub. L. No. 102-166, 105 Stat. 1071 (1991).

67. Pub. L. No. 98-459, 98 Stat. 1767, 1792 (1984), 9 U.S.C. § 623(h) (1994).

68. 42 U.S.C. § 12101 (1994).

of their foreign subsidiaries may be useful. In a statute drafted with rare sophistication, the Foreign Corrupt Practices Act<sup>69</sup> has been successfully applied to foreign subsidiaries of American corporations and thereby applied to the full range of multinational abuses such as bribery of foreign officials or illegal political contributions, whether done by American parent corporations or their foreign subsidiaries. As the success of the American statute became apparent and the serious threat to the international order presented by governmental corruption more fully appreciated, the world community itself was moved to proceed against these evils. The Foreign Corrupt Practices Act no longer stands alone. It has been joined by the OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions; the Inter-American Convention Against Corruption; and the European Union Convention criminalizing the bribery of officials of the Union or its member states, as well as by national statutes, such as those in Britain and Australia implementing the international understandings. In addition, the World Bank, its affiliates, and the International Monetary Fund have taken steps towards eliminating corruption in projects financed by them.<sup>70</sup>

Where statutory liability rests on "control" rather than upon a description framed in entity terms such as "incorporated in the United States," "railroad," or an "owner" or "operator," statutes operate efficiently and bring all elements of corporate groups within their scope. Traditional concepts of corporation law based on entity law and the severe limitations of "piercing the veil" remedy are no longer relevant. The usefulness of corporate manipulation to prevent implementation of the statutory purpose comes to an end.

Thus, legislative reform can readily provide the answer to the conceptual weaknesses of corporate jurisprudence as applied by the courts. It can readily serve as an adequate framework for assuring multinational accountability. The problems arise elsewhere in the political process and the great difficulties of developing the necessary

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69. 15 U.S.C. §§ 78dd-1, 78dd-2, 78l, 78o (1994).

70. See *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, OECD Doc. DAF/IME/BR(97)16/FINAL (1997), reprinted in 37 I.L.M. 1, available at <http://www.oecd.org/daf/nocorruption/20nov1e.htm> (Dec. 17, 1997); *Inter-American Convention Against Corruption*, OAS Doc. OEA/Ser.K/XXXIV.1/CICOR/doc.14/96 (1996), reprinted in 35 I.L.M. 724, available at <http://www.oas.org/juridico/english/treaties/b-58.html> (Mar. 29, 1996). See Stuart H. Deming, *Foreign Corrupt Practices*, 32 INT'L LAW. 463, 466-67 (1998).

political support for corporate reform. For example, the problem of illegal foreign campaign contributions and bribery of public officials had to become a well-publicized and well-documented national scandal affecting some of the country's largest corporations<sup>71</sup> before Congress responded with the enactment of the Foreign Corrupt Practices Act. It is likely that scandals of similar magnitude will be required before legislative reforms become a realistic possibility.

## II. An Unexplored Alternative

The existing legal system thus presents serious barriers. Corrective legislation aside, there nevertheless remains another promising, substantially unexplored, legal route to achieve increased accountability over the multinational corporation through use of the judicial process. This is increased reliance on direct actions against the senior American corporate personnel responsible for the corporate activities in question. Such litigation can rest on established principles of basic tort law. It would present none of the difficulties presented by entity concepts to the imposition of vicarious liability or to the problems presented by the attempted assertion of derivative jurisdiction over foreign affiliates by reason of the activities of a local affiliate. In brief, where an individual commits a tort, he or she is personally liable. It is irrelevant for such liability that the tort is committed by the individual in his or her capacity as a corporate officer or employee or that the offense is done for the benefit of the corporation.<sup>72</sup>

Since litigation against individual American officers and directors does not directly concern the American multinational parent or the subsidiary, it sidesteps entirely the problems presented by actions against foreign subsidiaries. Those difficulties arise from the traditional legal barriers to vicarious liability and difficulties of achieving jurisdiction. If successful, liability, of course, would be

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71. See, e.g., John J. McCloy et al., *Report of the Special Review Committee of the Board of Directors of Gulf Oil Corporation*, filed in SEC v. Gulf Oil Corp., No. 75-0324 (D.D.C. Dec. 30, 1975); Edward G. Harness et al., *Exxon Corp., Determination and Report of the Special Committee on Litigation*, Jan. 23, 1976; Max M. Fisher et al., *Report of the Special Investigation Committee of the Board of Directors of United Brands Co.*, filed in SEC v. United Brands Co., No. 75-0509 (D.D.C. Dec. 10, 1976).

72. See, e.g., RESTATEMENT (SECOND) OF AGENCY § 343 (1958) ("An agent who does an act otherwise a tort is not relieved of liability by the fact that he acted . . . on account of the principal . . ."); 3A WILLIAM MEADE FLETCHER ET AL., *CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* § 1135 (rev. perm. ed. 1994).

imposed only on the individuals involved; the companies of the multinational group would not be bound. However, this is not the end of the matter. In order to recruit and retain its overseas executive force to direct the affairs of its foreign subsidiaries, the multinational is under great, perhaps irresistible, pressure to assume responsibility for the judgments and to indemnify the individuals in question.

There is a further advantage. At a minimum, the litigation would provide a judicial inquiry into the realities of the behavior of the multinational under examination. Such litigation would not only expose the conduct of the multinational officials to the glare of the public scene. A judgment of the court sustaining the allegations of the complaint would also provide a definitive judicial evaluation of the conduct.<sup>73</sup> Further, unless the multinational enterprise disavows the actions of its own officials done in furtherance of its business objectives, it inevitably must play a role in defending the lawsuit, even if only behind the scenes. In such event under the established principles of issue preclusion, the facts found in the suit in the judgment against the officials would be binding in any further litigation against the multinational parent or subsidiary alike for the abuses in question<sup>74</sup> when and as American jurisdiction may be established over the foreign subsidiary. This alternative route to achieving multinational accountability appears to have sufficient promise to merit serious consideration.

### III. Enterprise Liability in American Common Law

Aside from the corporation law, in recent decades American common law has experienced a highly significant acceptance of enterprise liability in isolated areas, primarily tort law. Of these, product liability is the outstanding example. Older concepts have been simply swept aside with liability to the ultimate consumer imposed on all parties involved in providing dangerously defective goods to consumers. The sweep of liability includes all those involved: designer, manufacturer, distributor, wholesaler, and retailer. Parties are liable even though they had only bought and resold products without any history of defects that were in sealed containers.

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73. Cf. *Doe I v. Unocal Corp.*, 110 F. Supp. 2d 1294, 1310 (C.D. Cal. 2000) (noting that evidence suggested defendant knew of practice of forced labor on project in question).

74. See BLUMBERG, LCG-I, *supra* note 4, § 11.03.2.

Corporate affiliation between the parties, a factor of some significance in the last days of the waning older law, became irrelevant. Corporate factors and entity concepts, similarly, became irrelevant.

In the wake of the product liability revolution, its procedural counterpart, the "stream of commerce" concept emerged. This subjects to local jurisdiction foreign manufacturers exploiting the local market with a substantial amount of local sales so that the possibility of litigation should have been reasonably anticipated. It does so although the foreign manufacturer has no assets, employees, or affiliate in the forum. As with product liability, corporate affiliation between the foreign manufacturer and the American distribution chain is unnecessary. In an interesting development, "stream of commerce," originally confined to product liability, has been applied to allow American courts to assume jurisdiction of controversies in very different matters, including breach of contract cases and warranty infringement causing economic loss, as well as patent and copyright infringement cases.<sup>75</sup>

Another interesting development is the emergence of the "continuation of the enterprise" doctrine in successor liability matters in asset-acquisition transactions. This has been widely applied in statutory matters. Its acceptance at common law has been much more limited, but does include adoption by two of the most important industrial states in the nation: Michigan and Ohio. Without requiring continuance of shareholders as in the older law, this innovative doctrine imposes successor liability wherever the successor essentially continued the business, as with the same plant, employees, and products. In brief, notwithstanding the use of new corporate forms, the liabilities of the business run with the business. The economic realities, not legal forms, control.<sup>76</sup>

## Conclusion

Multinational enterprises typically conduct their overseas business through subsidiaries organized in the countries in which they are operating. Where this occurs, any multinational conduct giving rise to complaint is the conduct of the foreign subsidiary, not of the multinational group, under the established principles of traditional doctrines of corporation law and of "piercing the veil jurisprudence."

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75. See BLUMBERG, LCG-I, *supra* note 4, §§ 5.12a, 5.12b (Supp. 2000).

76. See BLUMBERG, LCG-I *supra* note 4, §§ 20.05-.11.

As a result, the imposition of vicarious liability on American multinational parent corporations for the conduct of their foreign subsidiaries becomes difficult.

In summary, serious barriers exist to achieving corporate accountability through application of existing legal standards to multinational enterprises. National legislation and international convention present obvious routes to reform. Litigation, with all its difficulties, can achieve improvement in some areas, such as where the multinational parent contrary to the usual pattern is itself directly participating in the conduct in question. This emphasizes the importance of proceeding as well with activities that, while entirely lawful, do not rest on the law, but are directed to altering the climate of opinion.

In contrast to the barriers presented by outworn corporate jurisprudence and the practical difficulties of achieving immediate legislative reform, the meta-legal pressures for achieving corporate social responsibility used in the past continue as an additional area for consideration. Organized efforts of consumers to harness market pressures on producers of consumer goods; consumer boycotts; moral pressures on corporate leadership; programs of recognition for business leaders demonstrating commitment to social objectives; encouragement of codes of self-regulation with adequate systems for determining and evaluating compliance so as to achieve meaningful credibility; shareholder proposals; and investor support of social justice portfolios have a common element. They influence the climate of opinion and collectively bring continuing pressures leading to step-by-step improvement of corporate standards. They inevitably have to be taken into account in corporate decision-making. With adverse public attitudes at risk, corporations seeking to maximize their performance are under pressure to comply. Market economics are being harnessed to support social responsibility, rather than being allowed to serve as the barrier trumpeted by some economists.<sup>77</sup>

The difficulties facing the judicial and legislative routes to achieving multinational accountability render even more desirable measures directed at maximizing market and social pressures to achieve increased multinational accountability. Building on past successes in the area, these pressures offer an alternative opportunity to achieve meaningful, if gradual and limited, improvement. In this

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77. See Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, § 6, at 32.



fashion, those seeking this goal can most usefully change the climate of opinion; and in the end it is the climate of opinion that will determine both the future responses of the legal system and the conduct of multinationals themselves.